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Supreme Court, U.S.
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No. 98-30

In the

Supreme Court of the United States

October Term, 1997

LECHUZA VILLAS WEST,
a California limited partnership,
Petitioner,

v.

CALIFORNIA COASTAL COMMISSION, STATE OF CALIFORNIA, STATE LANDS COMMISSION, and MALIBU-ENCINAL HOME OWNERS ASSOCIATION, INC.,
Respondents.

On Petition for a Writ of Certiorari to the California Court of Appeal, Second Appellate District

REPLY TO OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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13 pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTRODUCTION 1

ARGUMENT 1

I. THE STATE MISCHARACTERIZES THE NATURE OF THIS CASE 1

II. LECHUZA HAS NOT WAIVED ITS RIPENESS ARGUMENTS 6

A. The Parties' Joint Stipulation Regarding the Order of Trial Is Utterly Irrelevant 6

B. Lechuza's Federal Takings Claim Was Addressed by the Court Below 7

III. THE DECISION BELOW ***DOES*** CONFLICT WITH *WILLIAMSON COUNTY* 8

CONCLUSION 10

TABLE OF AUTHORITIES

Page

Cases

Adams v. Robertson, 117 S. Ct. 1028 (1997) 7

First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304 (1987) .. 1, 5-6, 10

Heath v. Alabama, 474 U.S. 82 (1985) 7

Landgate, Inc. v. California Coastal Commission, 953 P.2d 1188 (Cal. 1998), *petition for cert. filed* (U.S. July 28, 1998) (No. 98-183) 1, 10

Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992) 4, 6-7, 9

Nollan v. California Coastal Commission, 483 U.S. 825 (1987) 8

People v. William Kent Estate Co., 51 Cal Rptr. 215 (1966) 3

Williamson County Regional Planning Commission v. Hamilton Bank, 473 U.S. 172 (1985) 4, 6, 8-10

Statute

28 U.S.C. § 1257(a) 7-8

REPLY TO OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Lechuza Villas West (Lechuza) respectfully files this reply to the opposition to its petition for a writ of certiorari.

INTRODUCTION

Respondents California Coastal Commission, State Lands Commission, and State of California (collectively, the State) have filed an opposition to Lechuza's petition. That opposition proffers three reasons—two procedural and one substantive—why the petition should not be granted. As explained below, these reasons are wholly lacking in merit. Importantly, moreover, the State does not even attempt to dispute the petition's demonstration that the decision below stands in irreconcilable conflict with both *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987), and with the decisions of other state courts and lower federal courts.[1]

ARGUMENT

I

THE STATE MISCHARACTERIZES THE NATURE OF THIS CASE

To read the State's opposition, one would think this is a physical takings case involving a fixed swath of land that is owned all the time either by Lechuza or by the State. To read

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[1] In discussing the significance of the decision below, Lechuza's petition explained the relation between that decision and the decision of the California Supreme Court in *Landgate, Inc. v. California Coastal Commission*, 953 P.2d 1188 (Cal. 1998). *See* Pet. at 21-25. Since Lechuza's petition was filed, the property owner in *Landgate* has also filed a petition for certiorari, which is docketed as No. 98-183. Not only is the Coastal Commission a party to both cases, counsel for respondents here also acted as counsel for the respondent in *Landgate* in the California courts. In light of the close connection between the two cases, the Court may wish to consider consolidating them if it is disposed to act favorably on one or both of them.

the State's opposition, one would think that the parties litigated the ownership of the swath and that the state courts awarded ownership to the State. Yet (in the State's account of this case) Lechuza continues—inexplicably, nonsensically, obtusely—to assert a takings claim on property that it does not own! How could such a claim be taken seriously? How could such a petition possibly be granted?

The State's account is fantasy. Lechuza has owned since 1990—and under the lower court's decision will continue to own—17 lots on Lechuza Beach. As to the northerly (landward) portion of each lot (extending between 37 and 82 lineal feet per lot, an area encompassing some 50,000 square feet in total), the State has no claim to ownership whatsoever. These portions of Lechuza's lots are landward of "the most landward [known] location of the mean high tide line," the self-identified limit of the State's claim to fee ownership of the beach. 4 Joint Appendix in the California Court of Appeal (J.A.) 777 (cross-complaint of State of California).[2] The State's insinuation that Lechuza does not "own" this property is inaccurate on its face.

To the seaward of the portions continuously and indisputably owned by Lechuza is a swath of land that (under the lower court's decision) shifts from private to public ownership and back again based on the movements of the sandy beach. *See* Pet. App. at B-21 (holding that "the proper boundary between the State's tidelands and Lechuza's private property is a line which moves as the ordinary high tide (a fixed plane) intersects the shifting sands from day to day").[3] The seasonal fluctuation

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[2] The State did claim a "navigational" easement over additional portions of Lechuza's lots, but the court below rejected that claim, *see* Pet. App. at B-34 to -37, and the California Supreme Court denied the State's petition for review of the issue, *see* Pet. App. at A-1.

[3] In another attempt to portray Lechuza as obtuse (and therefore unworthy of this Court's attention), the State insinuates that Lechuza, by seeking to establish a fixed tidelands boundary on Lechuza Beach,

(continued...)

of the line marking the boundary between private and public ownership can be as much as 110 feet. *See* Pet. App. at E-3 to -4 (trial court findings). The footprint of the homes Lechuza proposed to build on its lots extended into this zone by between 10 and 25 feet per lot. How much of the time is this extension "owned" by the State rather than by Lechuza? The evidence cited by the *Coastal Commission* in its fourth and final denial of Lechuza's development permit applications was as follows: (1) photographic analysis indicating that in the 66 years since the beach was surveyed in 1932, on only "seven ***occasions***" (not seven years) had the boundary migrated landward of the project footprint; and (2) statistical analysis predicting that the boundary would move landward of the project footprint a mere "***1%*** of the time"—essentially during the most severe winter storms that occasionally erode the beach for short periods of time. Pet. App. at F-18 (emphasis added).

In the lower courts, the State is relying on this evidence to advance the aggressive legal theory that it has the right, purely as a matter of property law, to prohibit any permanent development of land that it does ***not*** own 99% of the time. Given their hostility to private property owners, the California courts may ultimately accept the State's theory. But the court below assuredly did ***not*** resolve the issue. As explained in the petition, the California Court of Appeal did no more than rule that "the legal boundary line is ambulatory, not fixed." Pet. App. at

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[3] (...continued)
has sought to escape from a tidelands boundary rule supposedly existing "[s]ince the earliest days of western civilization." Opp. at 10. Not only is this insinuation irrelevant to the question presented, it is false. *See People v. William Kent Estate Co.*, 51 Cal. Rptr. 215, 219 (1966) (authorizing and directing the trial court to "fix[] an *average, mean, or ordinary* line of the shore against which the average plane of the water at high tide may be placed [in order] to determine a *reasonably definite* boundary line." *Id.* (emphasis added). In denying Lechuza's petition for review, the state supreme court chose not to resolve the conflict between *Kent Estate* and the decision below.

B-21 (capitalization altered). The court did not discuss whether the "ambulatory" nature of the boundary line was sufficient, as a matter of state property law, to uphold the State's claim that Lechuza may not build homes that extend in small part into the zone of potentially shifting ownership. *See* Pet. at 7-8, 13-14 n.7. Thus, contrary to the State's wishful thinking, "the issue of where Lechuza will be allowed to build, given the Court of Appeal's determination that the boundary is the moving mean high tide line, *remains to be determined*." Plaintiff's Status Conference Statement at 12 (filed in the trial court on July 28, 1998) (emphasis added).

Of course, Lechuza does not ask this Court to resolve any of the aforementioned state-law issues. Rather, Lechuza's petition concerns solely its federal claim for a temporary taking based on the Coastal Commission's having denied all economically viable use of Lechuza's lots for seven years and counting. The court of appeal rejected this claim ***not*** because it found that the agency had failed to arrive at a definitive position regarding how Lechuza would be allowed to develop its property, *see Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172, 191 (1985), or that Lechuza could nonetheless make economically viable use of its lots or that Lechuza did not "own" the lots or that other background principles of state property and nuisance law precluded development of Lechuza's property, *see Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1029 (1992). Instead, the court below rejected Lechuza's takings claim because Lechuza had not, *prior to* bringing its takings action, judicially negated all of the State's attacks on its title and all of the State's other arguments based on state property and nuisance law. In other words, *even if* the Coastal Commission had made a definitive decision, *even if* that decision had denied Lechuza all economically viable use of its property, and *even if* state property and nuisance law did not justify the agency's decision, Lechuza's takings claim must be rejected because it was not ripe.

The lower court's ripeness ruling is most starkly illustrated by considering the "navigational" easement asserted by the State. According to the State, Lechuza's *entire* property was burdened with an easement allowing members of the public to use the beach for recreational purposes, thus precluding ***any*** development whatsoever on Lechuza's lots. *See* Pet. at 4-5 & n.2. The court of appeal rejected this claim and thereby negated the State's "background principles" defense with respect to 50,000 square feet of Lechuza's property. *See* Pet. App. at B-34 to -37. But did the court of appeal consequently affirm that Lechuza had suffered a temporary taking of (at least) that portion of its property? No, the court informed Lechuza that, having succeeded in judicially negating the State's purported justification for denying all economically viable use of its property, Lechuza's "proper remedy would [be] to resubmit permit applications" to the Coastal Commission. Pet. App. at B-20. Whether such a ruling is consistent with this Court's holding that mere invalidation of government action "without payment of fair value for the use of the property during this period of time would be a constitutionally insufficient remedy," *First English*, 482 U.S. at 322, is an issue raised by the petition.

In sum, the State's notion that Lechuza is pursuing a takings claim "even though it did not own the property on which its project was located," Opp. at 8, is a fundamental mischaracterization of this case. In actual fact, Lechuza is pursuing a takings claim based on property most of which is continuously and indisputably owned by Lechuza, some of which is owned by Lechuza 99% of the time (with ***no*** court having accepted the State's theory that Lechuza is precluded from building thereon), and all of which was forced by the State to remain economically idle for seven years. The petition showed that the lower court's rejection of this takings claim on ripeness grounds is in irreconcilable conflict with (among other cases) this Court's decision in *First English* and the decisions of other state courts and lower federal courts. For all its obfuscation about "ownership," the State's opposition does not even attempt to dispute

the existence of such conflicts.[4] Nor, as set forth below, do any of the State's other reasons for denying the petition have merit.

II

LECHUZA HAS NOT WAIVED ITS RIPENESS ARGUMENTS

A. The Parties' Joint Stipulation Regarding the Order of Trial Is Utterly Irrelevant

The State asserts that "Lechuza waived its argument that its taking claim was ripe regardless of whether it owned the property that is the subject of its taking claim" because Lechuza "voluntarily amended its complaint to add quiet title claims and then stipulated that the quiet title issue would be tried before the taking[s] claim." Opp. at 8-9. It is difficult to comprehend this assertion. As explained above, this case does not concern whether a property owner can assert a takings claim "regardless of whether it owned the [subject] property." *Id.* Lechuza is more than willing, here and now, to "waive" any argument that a person can establish a *Lucas*-type taking if the land-use limitations that deny all economically viable use of the subject property "inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership." *Lucas*, 505 U.S. at 1029.

That leaves the parties' stipulation on the order in which the various claims were to be tried in the superior court. We see no significance in the order of trial, and the State proffers absolutely no explanation why it should be relevant. Perhaps the State is asserting that a governmental defendant has a right

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[4] Given that fully half of Lechuza's petition is devoted to explaining how the court below decided an important question of takings procedure in a manner that conflicts with *Williamson County* and *First English*, *see* Pet. at 10-24, the idea that Lechuza somehow "concedes that the court of appeal's resolution of the takings issue does not present a genuine conflict with this Court's ripeness decisions," Opp. at 8 (citing Pet. at 25), is nonsense.

to demand that a property owner litigate its takings claims prior to any other issues between the parties. If so, it would seem that *the State* waived this right when ***it*** stipulated (as a counterparty to the joint stipulation with Lechuza, *see* 5 J.A. 1177) that the quiet title issues would be tried first. In any event, the joint stipulation is irrelevant to the question presented to this Court.

B. Lechuza's Federal Takings Claim Was Addressed by the Court below

Relying on *Adams v. Robertson*, 117 S. Ct. 1028 (1997) (per curiam), and *Heath v. Alabama*, 474 U.S. 82, 87 (1985), the State asserts that Lechuza is "preclude[d] from seeking this Court's review of the taking issue" because Lechuza's petition for review to the California Supreme Court failed to raise the question now before this Court Opp. at 9. Although the State provides no argument in support of this assertion, we assume that State is attempting to invoke the rule that this Court "will not consider a petitioner's federal claim unless it was either addressed by, or properly presented to, the state court that rendered the decision we have been asked to review." *Adams*, 117 S. Ct. at 1029 (citing *Heath*, 474 U.S. at 87).

The *Adams-Heath* rule is fully satisfied here. The "state court that rendered the decision [this Court has] been asked to review," *id.*, is the California Court of Appeal, Second Appellate District. Lechuza's federal takings claim was undoubtedly "addressed by" that court, *id.*, when it ruled that "there can be no *taking*, temporary or permanent, until there is a final governmental determination which deprives the property owner of all or substantially all economic use of his or her property. There has been no such final determination here." Pet. App. at B-21 (emphasis in original) (omitting citations to California cases involving federal takings claims); *see also id.* (citing *Lucas*).[5]

[5] The lower court's explicit disposition of Lechuza's federal takings claim also disposes of the State's bald assertion that this Court lacks jurisdiction under 28 U.S.C. § 1257(a). *See* Opp. at 2. Because the

(continued...)

III

THE DECISION BELOW *DOES* CONFLICT WITH *WILLIAMSON COUNTY*

As the State acknowledges, Lechuza argued in its petition that "the court of appeal supplanted *Williamson County*'s requirement that a claimant obtain a final administrative decision with a requirement that a claimant obtain a final judicial decision." Opp. at 11. The State now asserts that, in so arguing, Lechuza "misreads" the decision below: "The court of appeal did not impose a final judicial decision requirement. The court of appeal found that the Coastal Commission itself could not issue a final administrative decision until Lechuza proposed a project on property that it owned." *Id.* As in another case involving a taking by the Coastal Commission, "[r]ewriting the argument to eliminate the play on words makes clear there is nothing to it." *Nollan v. California Coastal Commission*, 483 U.S. 825, 838 (1987).

As explained in detail in the petition—*and never disputed in the State's opposition*—the Coastal Commission determined no later than 1991 that ***no*** residential development of ***any*** of

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[5] (...continued)
California Supreme Court did not accept discretionary review of this case, "the highest court of [California] in which a decision could be had," § 1257(a), was the California Court of Appeal, Second Appellate District. That court issued a final judgment rejecting Lechuza's right to receive compensation for a temporary denial of all economically viable use of its property, a right that was "set up or claimed under the Constitution . . . of . . . the United States." *Id.*; *see also* Petition for Review at 23-24 (arguing that review should be granted because (among other reasons) "the court of appeal's ruling ratifies an outcome in which Lechuza may build nothing at all on property that indisputably belongs to it 99% of the time . . . [which] has resulted in Lechuza's inability to make *any* economically viable use of its beachfront lots for nearly eight years—no doubt the primary reason the trial court found that Lechuza had suffered a temporary taking of its property"). This Court has jurisdiction under § 1257(a).

Lechuza's property would ever be allowed. *See* Pet. at 4-5 n.2, 11-12 & n.5. That is, no matter where Lechuza had proposed its project, the agency would nonetheless have rejected it on several grounds, including the ground that every square inch of Lechuza's lots was burdened with a "navigational" easement. Accordingly, there can be no question as to the Coastal Commission's "decision regarding how [Lechuza] will be allowed to develop its property," or to as the agency's "position regarding how it will apply the regulations at issue to the particular land in question." *Williamson County*, 473 U.S. at 190, 191. That decision, that position, was clear: No development! In the agency's own words: "From time to time, the Commission sees cases where someone purchases property which cannot be developed consistent with reasonable requirements to protect the public's health, safety, and welfare." 10 J.A. 2492.

What is the State's argument that this decision was not "final"? It is essentially that the Coastal Commission *believed* that residential development of Lechuza's lots was precluded by "a pre-existing limitation upon [Lechuza's] title" and by other "background principles of the State's law of property and nuisance." *Lucas*, 505 U.S. at 1028, 1029. In particular, the agency *believed* that Lechuza's title was limited by the State's ability to preclude all development of (1) ground in which the State held a potential ownership interest (the zone of potentially shifting ownership, comprising a small portion of Lechuza's proposed project), and (2) ground over which the State held a "navigational" easement on behalf of the public (comprising all of Lechuza's project and, indeed, Lechuza's entire property). *See* Pet. at 4-5 & n.2, 12. How, in the face of these beliefs, could Lechuza have extracted a truly "final" decision from the Coastal Commission? The State's opposition does not answer this question, but the decision under review does: there can be a "final governmental determination" only when an applicant has "establish[ed] that it ha[s the] right to develop 'its' property [under state law]." Pet. App. at B-21. And how is such a right to be "established"? By a final *judicial* decision, of course.

In the end, the court of appeal *did* impose a final judicial decision requirement. Under the decision below, an agency that deprives property of all economically viable use cannot be said to have issued a "final" decision so long as the agency can conceive of any justification for the deprivation based in state property or nuisance law. Until the owner sues the agency and "establishes"—by a final *judicial* decree obtained perhaps years after the deprivation became effective—the owner's takings claim is not ripe. As Lechuza explained in the petition, such a requirement cannot be reconciled with *Williamson County*. *See* Pet. at 14-17. Under the lower court's reasoning, because the claim was not ripe for all that time, and the property owner will ***never*** be able to recover "compensation for the period during which the [deprivation] was effective," the very compensation mandated by *First English*, 482 U.S. at 321. *See* Pet. at 18-19.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in the petition, Lechuza's petition for certiorari should be granted.

In light of the close connection between the present case and *Landgate v. California Coastal Commission* (No. 98-183), *see* note 1, *supra*, the Court may also wish to consider consolidating the two cases or (at the very least) holding the present case pending the final disposition of *Landgate*.

DATED: August, 1998.

Respectfully submitted,

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